

PDC Interpretation

APPROVAL DATE:	September 26, 2000	NUMBER:	00-04
STATUS:	New	SUPERSEDES:	None
REFERENCES:	<u>Washington State Republican Party v. Washington State Public Disclosure Commission et al.,</u> 141 Wn.2d 245, 4 P.3d 808 (July 27, 2000) RCW 42.17.640	APPROVED BY:	The Commission

SEE ALSO:

Use of "Soft Money" for Issue Advocacy

What is the effect of the State Supreme Court's decision Washington State Republican Party v. Washington State Public Disclosure Commission et al., 141 Wn.2d 245, 4 P.3d 808 (July 27, 2000) on the use of exempt funds under RCW 42.17.640 ("soft money") by political parties for advertisements and publications that educate the voters on a candidate's stand on the issues?¹

The Public Disclosure Commission enforces the campaign finance reporting requirements in chapter 42.17 RCW. The voters passed the Fair Campaign Practices Act (Initiative 134). One section of the act, RCW 42.17.640(6), limits contributions to political parties. Some contributions are not subject to contribution limits under subsection (14). These subsection (14) funds have commonly been referred to as exempt funds, or "soft money", and these contributed funds may be expended only for the nine purposes set out in statute, so long as none of those activities promote or are in direct association with individual candidates. The statute at 42.17.640 RCW reads in part:

(1) No person, other than a bona fide political party or caucus political committee, may make contributions to a candidate for a state legislative office that in the aggregate exceed *five hundred dollars or to a

¹ Readers are advised that this Interpretation does not seek to be an exhaustive analysis of the court's decision, but rather represents a distillation of some of the key points of the opinion. The Commission could, in an advisory or enforcement setting, rely on portions of the decision not cited in this Interpretation.

candidate for a state office other than a state legislative office that in the aggregate exceed *one thousand dollars for each election in which the candidate is on the ballot or appears as a write-in candidate....

...

(3)(a) Notwithstanding subsection (1) of this section, no bona fide political party or caucus political committee may make contributions to a candidate during an election cycle that in the aggregate exceed (1) *fifty cents multiplied by the number of eligible registered voters in the jurisdiction from which the candidate is elected if the contributor is a caucus political committee or the governing body of a state organization, or (ii) *twenty-five cents multiplied by the number of registered voters in the jurisdiction from which the candidate is elected if the contributor is a county central committee or a legislative district committee.

...

(6) Notwithstanding subsections (1) through (4) of this section, no person other than an individual, bona fide political party, or caucus political committee may make contributions reportable under this chapter to a caucus political committee that in the aggregate exceed *five hundred dollars in a calendar year or to a bona fide political party that in the aggregate exceed *two thousand five hundred dollars in a calendar year. This subsection does not apply to loans made in the ordinary course of business.

[* Amounts are adjusted for inflation by the PDC.]

...

(14) The following contributions are exempt from the contribution limits of this section:

(a) An expenditure or contribution earmarked
for voter registration,
for absentee ballot information,
for precinct caucuses,
for get-out-the-vote campaigns,
for precinct judges or inspectors,
for sample ballots, or
for ballot counting,

all without promotion of or political advertising for individual candidates; or

(b) An expenditure by a political committee for its own internal organization or fund raising without direct association with individual candidates.

On July 27, 2000 the Washington State Supreme Court issued an opinion regarding this statute. In Washington State Republican Party v. Washington State Public Disclosure Commission, 141 Wn.2d 245, 4 P.3d 808 (2000), the court ruled that RCW 42.17.640's limitations in subsections (6) and (14) are unconstitutional as they were applied to "issue advocacy," in that case, to television advertisements. Readers of this PDC Interpretation are urged to review the court's entire written opinion for the full analysis of the law. The opinion is available in law libraries. The opinion is also available online for subscribers to Westlaw, at the citations above or at 2000 WL 102513, and is available to the public online through Access Washington at www.courts.wa.gov under "Opinions" and on the Commission's Web site (see hyperlink at end of this document).

The court found that "express advocacy" for or against a candidate can be regulated by the state by a statute such as RCW 42.17.640, but "issue advocacy" that educates voters about issues and candidates' positions cannot be similarly regulated. In other words, exempt funds or "soft money" can be used (contributed and spent), without limit, for issue advocacy, despite the language in RCW 42.17.640 that provides only certain categories of permissible uses for such funds in subsection (14). To aid political parties, candidates, campaigns, caucus political committees, and others, the Commission highlights the following as some of the key language of the decision (*page numbers refer to the official publication of the opinion in Washington Reports Second at 141 Wn.2d 245; other or online publications of the opinion may use different page numbers*):

What Is Express Advocacy?

- "[C]ommunications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' reject.'" (Page 264)
- "[W]hen a candidate's character and campaign tactics are attacked, the ad may be subject to only one reasonable interpretation: an exhortation to vote against the candidate." (Page 270)
- "The Furgatch ad told its readers that if they "let him [the then-president] do it," the country would be burdened with four more years of his leadership. (Citation omitted). It clearly exhorted voters to stop [the then-president] from being re-elected. The only way to do this was to vote against him."² (Page 271)
- "[When an ad] "is unmistakable and unambiguous in its meaning, and presents a clear plea for the listener to take action to defeat [a] candidate." (Page 273)

² The language in this advertisement is listed here merely as an example of express advocacy cited by the State Supreme Court. The language was considered by the federal Ninth Circuit Court of Appeals in Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir. 1987). Readers of this Interpretation are advised, however, that while the State Supreme Court used this language as an example of express advocacy, the state court disagreed in part with the federal court's legal analysis in Furgatch (see opinion at pages 267-269).

- "In Massachusetts Citizens for Life, Inc., the Court found such exhortations [to action] where a publication urged voters to vote for pro-life candidates, and identified and provided pictures of specific candidates fitting that description. The Court said the '[t]he fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature. The [publication] goes beyond issue discussion to express electoral advocacy." (Pages 264-65)
- An example of an "express advocacy" ad is a television commercial describing a candidate's stand and actions regarding crime-related issues, and ending with, "And now he wants to be our governor? [Candidate's name]: another extreme liberal we just can't afford." (Pages 252 and 273)

What Is Issue Advocacy?

- "[I]ssue advocacy intend[s] to inform the public about political issues germane to [an] election..." (Page 272)
- "When a candidate's stand on the issues is attacked ... the ad provides the viewer with information on the candidate's stand on the issues, and also suggests any number of responses." (Pages 270 - 271)
- "So long as the ad does not constitute an exhortation to vote for or against a specific candidate ... it is not express advocacy." (Page 271)
- The timing of an ad (with respect to when elections occur) is not relevant in determining if an ad is issue advocacy or express advocacy. "Issue advocacy does not become express advocacy based upon timing. The right to freely discuss issues in the context of an election, including public issues as they relate to candidates for office, is precisely the kind of issue advocacy the Court recognized was beyond the reach of regulation...[t]he most effective political speech respecting issues vis-à-vis candidates may well occur in the thick of the election campaign." (Pages 267- 268)
- An example of an "issue advocacy ad" is a television commercial describing a candidate's stand and actions regarding crime-related issues, and ending with "Tell [candidate's name] that's not what we call getting tough on crime. Tell [candidate's name] that we deserve better." (Page 251)³

³ As timing is not a factor in determining whether an ad is issue advocacy, motive is also not a factor. With respect to this ad, the Supreme Court further held that, "The Party [sponsoring the ad] admits that it was trying to influence an election, but it was doing so by educating the voters' on the candidates' positions on the issues." (Page 272) "The fact that the 'Tell [candidate's name]' ad was partisan, negative in tone, and appeared prior to the election does not strip it of its First Amendment protection for issue advocacy." (Page 273)

What Is The Effect of The Court's Decision on the Use of "Soft Money" in RCW 42.17.640(6) and (14)?

- "[T]he unconstitutionality in the statute results both from limitations on contributions for issue-oriented political speech and the prohibition on exempt expenditures for such speech...both sections are invalidated as to issue advocacy." (Page 283)

Therefore, Based Upon This Supreme Court Decision, What Does the Commission Conclude?

The Commission concludes, based on the decision referenced above, that:

- (a) Under RCW 42.17.640, a party is allowed to receive unlimited contributions from all sources -- individuals, businesses, unions, associations, etc. -- for issue advocacy; and
- (b) Under RCW 42.17.640, a party's exempt funds -- its "soft money" -- may be used for issue advocacy.

[WA State Republican Party v. PDC](#) – hyperlink to copy of WA State Supreme Court Decision